

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

FRANK M. LEIGH,

Plaintiff,

v.

NO. 1:98CV22-S-D

THOMAS E. VICE,

Defendant.

OPINION

With the filing of this suit, this cause has now been presented to four separate courts, including the Chancery Court of Lowndes County, Mississippi, the Mississippi Supreme Court, and the United States Bankruptcy Court for the Northern District of Mississippi. These judicial exercises have resulted in what plaintiff perceives to be conflicting rulings about the validity of a nonresidential lease. He turns to this court on this occasion seeking a permanent injunction to halt the enforcement of a state ruling which gave defendant the right to reenter the subject property for an additional fifteen-year term and which, in his view, effectively overruled certain decisions made by the bankruptcy court. Jurisdiction is predicated on the All Writs Act, 28 U.S.C. § 1651.

BACKGROUND

The facts of this case have been extensively repeated by all courts which have considered this matter. In the interest of judicial economy, the court turns to the last opinion of the bankruptcy court for a recitation of the facts of this case:

On June 28, 1977, Leigh as the landlord/owner entered into a lease agreement with Vice as the tenant for a fifteen year primary term with an option to renew for an additional fifteen year term beginning June 28, 1992....

Because of disputes involving the lease, Leigh filed suit against Vice in the Chancery Court of Lowndes County, Mississippi. A decree was entered April 28, 1992, adjudicating that Vice had forfeited his right to renew the lease for the second fifteen year term because of his leasehold defaults. Vice appealed this decision to the Mississippi Supreme Court *without* supersedeas.

Vice filed a voluntary Chapter 11 bankruptcy petition on May 29, 1992. At the time of the bankruptcy filing, the primary term of the lease had not expired. Yet, Vice filed no motion to assume the lease as required by § 365(d)(4) of the Bankruptcy Code, which provides as follows:

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

Vice also failed to timely file a motion to extend the deadline to assume the lease. However, on August 5, 1992, he filed an adversary proceeding, No. 92-2177, against Leigh requesting the court to protect his rights under the lease. Unfortunately for Vice, this adversary proceeding cannot be considered as an informal motion to assume the lease because it was filed subsequent to the expiration of the sixty day period specified in § 365(d)(4).

Leigh had previously filed a motion seeking relief from the automatic stay so that he could obtain possession of the leased premises.

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The court heard and considered Leigh's motion seeking relief from the automatic stay, as well as, Vice's adversary proceeding, and entered orders respectively on August 10, 1992, and August 20, 1992. In substance, the court determined that the automatic stay was not applicable to Leigh since the lease had

been previously terminated by the Lowndes County Chancery Court. In addition, the court noted that no motion had been filed by Vice to assume the lease....The two orders entered by this court were never appealed.

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The bankruptcy case was subsequently closed on October 20, 1994, but reopened on January 28, 1996, following the reversal of the decision of the Lowndes County Chancery Court by the Mississippi Supreme Court. The Supreme Court's opinion was rendered on November 30, 1995, and a petition for rehearing was denied on March 14, 1996.

*Leigh v. Vice*, Adv. Proc. No. 96-2042 (Bankr. N.D. Miss. Aug. 16, 1996).

Leigh then initiated adversary proceeding number 96-2042 in the bankruptcy court to determine his rights under the lease following the decision by the Mississippi Supreme Court which allowed Vice to renew the subject lease for another fifteen-year term. Specifically, Leigh asked the bankruptcy court to issue a declaratory judgment that Vice's failure to assume or reject the lease operated as a deemed rejection of the lease under the bankruptcy code, thereby terminating any leasehold interest he might have had in the subject property. On cross-motions for summary judgment, the bankruptcy court found that because Vice did not properly pursue his bankruptcy remedies, he could not now assume the lease under the bankruptcy code. The court concluded:

Because of his chosen course of action, this is no longer a matter that should be adjudicated in the bankruptcy court. If Vice is entitled to relief, he must obtain same in state court. If the failure to post a supersedeas bond proves fatal, this shortcoming cannot and should not, absent the timely filing of the appropriate § 365(d)(4) motions, be rectified in this court.

Subsequently, the parties filed cross-motions to alter or amend, in essence seeking clarification of the bankruptcy court's opinion. In turn, the court issued the following order in pertinent part:

Vice did not properly pursue his bankruptcy remedies. Accordingly, he is not entitled

to assume the rights, in this Court, under the lease, nor pursue any claims in this Court for alleged breaches or violations by Leigh of the terms of that lease. To the extent that Vice may have rights under the lease which became available by reason of the decision of the Mississippi Supreme Court, then he is left to pursue those rights in the state court action pending in Lowndes County Chancery Court. The Order of this Court here is not intended to and does not foreclose any claims which Vice has heretofore pursued, or may pursue in state court, but merely precludes the assertion of those rights here in Bankruptcy Court.

With these rulings and the decision of the Mississippi Supreme Court in hand, Vice returned to chancery court seeking possession of the leased premises and an assessment of damages. On December 17, 1997, the chancery court ordered Leigh to surrender possession of the subject property on or before February 1, 1998, for the remainder of the fifteen-year term in the lease option. The court denied all requests for damages. Final judgment was entered on January 19, 1998, and the next day, Leigh filed the instant action, seeking to protect and effectuate the orders of the bankruptcy court through the issuance of a permanent injunction halting enforcement of the state court judgment which Leigh believes is in contravention of the bankruptcy court's rulings.

Presently before the court are the motions of Leigh for summary judgment and of Vice for dismissal or, alternatively, for summary judgment. Interestingly, both parties believe that the bankruptcy court rulings work in their favor—Leigh maintains, in short, that the deemed rejection of the lease operated as a termination of the lease, and therefore Vice was precluded from seeking possession of the property in chancery court, the ruling by the supreme court notwithstanding, while Vice argues that the rulings of the bankruptcy and chancery courts are res judicata and collateral estoppel to any relitigation of the issues presented and that Leigh's attempts to "appeal" the ruling of the bankruptcy court are time barred.

## DISCUSSION

Though the parties have indicated to the court that they believe the resolution of this case is quite simple, that view is not shared either by this court or those who have studied the issue in depth. Indeed, one of the recognized experts on the interpretation of § 365 has stated: “[B]ehind the deceptively simple prescription of section 365(a) [permitting the trustee or the debtor in possession to assume or reject any executory contract or unexpired lease of the debtor] lurks a hopelessly convoluted and contradictory jurisprudence, rendering this one of the most difficult areas of bankruptcy law.” Michael T. Andrews, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. Colo. L. Rev. 1, 1 (1991). Granted, the Fifth Circuit has resolved much of the conundrum contemplated by Andrews when it agreed with his conclusion that a deemed rejection of an unexpired lease, as occurred in this case, does not effect a termination of that lease, but only a breach. *In re Austin Development Corporation*, 19 F.3d 1077, 1083 (5th Cir. 1994). In that manner, the interests of the lessor as a creditor of the bankruptcy estate and any third party holding a security interest in the leasehold are protected. This case is complicated, however, by the portion of the statute which requires the trustee immediately to surrender the property to the lessor, 11 U.S.C. § 365(d)(4), the question thus becoming whether a state court can order the lessor to allow the lessee to re-enter property from which he has been dispossessed by operation of bankruptcy law. The Fifth Circuit touched on this issue in *Austin* when it refused to adopt the argument that the deemed rejection of a lease coupled with surrender is equivalent to termination of the lease, *Austin*, 19 F.3d at 1082; however, it did not address the precise issue presented here, and indeed, the court can find no definitive answer to this question.

Nevertheless, after mature consideration of the last two rulings of the bankruptcy court in this

case, the reasoning of *Austin*, and the underlying policy considerations of § 365(d)(4), the court finds that the ultimate question of the continued validity of the lease at issue was a matter for the state courts of Mississippi. Though Judge Houston did not specifically make that finding, it is clear from his rulings that he believed that any further issues related to the lease were a matter for adjudication in the Chancery Court of Lowndes County. In the court's December 4, 1996, order amending the August 16, 1996, order, the court granted Leigh's motion for summary judgment only "to the extent that Vice has any rights which [could] be perfected or pursued in [the bankruptcy] Court," thereby leaving the parties free to pursue their claims in state court. Though on its face, this may have appeared to be a favorable ruling for Leigh, it was not, as it clearly did not grant Leigh the complete relief he sought, i.e., "the exclusive ownership, occupancy, management, use and possession of the real property at issue." Of import is the fact that Leigh did not appeal that ruling, and in this court's mind, his invocation of the All Writs Act on this occasion--his attempts to continued possession of the property having now failed in state court--is nothing more than an attempt to take an out-of-time appeal of what was in essence an adverse ruling of the bankruptcy court. Leigh's motion for summary judgment is therefore not well taken and is denied. Vice's motion to dismiss or, alternatively, for summary judgment is granted, and this case is hereby dismissed with prejudice.

An appropriate final judgment shall issue.

This \_\_\_\_\_ day of March, 2001.

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SENIOR JUDGE